IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.650 OF 1995

Gundu Apparao Deshpande,
Superintendent,
Central Excise & Customs Preventive,
Satara Division, Satara, through
P.P., Union of India. Appellant
(Org.Complainant)

Vs.

1. Smt.Rashidabi Gulabhussain Shaikh,
age 40 years, Occ: Household,
R/at Koregaon (Kalkai), House
No.2730, Koregaon, Tal.Koregaon,
Dist. Satara.

2. State of Maharashtra Respondents
(No.1-Org.Accused)

Mr.D.N.Salvi, Standing Counsel for appellant-Union of India.
Advocate for Respondent No.1-absent.
Dr.F.R. Shaikh, APP for State.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.
February 04, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.):

1. This appeal is filed by the original complainant, Superintendent of Central Excise & Customs Preventive, Satara challenging the judgment and order dated 2/5/1995 delivered by the Sessions Judge, Satara acquitting the respondent-accused of the offence under Section 20(b)(i) of the NDPS Act.

2. The prosecution case briefly stated is as

follows:

. Pursuant to the information the officer of the Central Excise made a search of the residential premises of the accused on 7th October 1991. PW 3 was the Superintendent of Central Excise at the relevant time and had lodged the complaint and had issued search warrant under Section 41(2) of the NDPS Act for searching the house of the respondent-accused. The raiding party was accompanied by two panchas. On search of the residential premises two polythene bags containing 167 and 210 packets of ganja were recovered which were kept behind the frames. The raiding party also recovered two tins concealed in the house which contained flowers and leaves of ganja. The total ganja recovered from the said premises was 8.25 Kgs. valued at Rs.4000/-. The samples were drawn by the officers and thereafter accused was arrested. At the time of arrest PW 2 Ashok Chavan had allegedly gone there for the purchase of ganja. The samples were sent for analysis to the CA. CA report dated 31/10/1991 is produced on record as Exhibit 13 as per which the samples were of ganja. After completion of investigation the complaint was lodged by PW 3, the

Superintendent of Excise Deshpande.

3. The learned Sessions Judge framed charges against the respondent-accused on 30th December 1994 for offence under Section 20(b)(i) read with Section 8(c) of the NDPS Act and for offence under Section 66(1)(b) of the Bombay Prohibition Act to which the accused pleaded not guilty. On behalf of the prosecution six witnesses were examined. PW 1 is Uttam Rasal, the Inspector of Central Excise who was member of the raiding party. PW 2 is Ashok Chavan who was examined to show that he had gone to the premises in question at the time of raid for purchase of ganja. He had turned hostile and did not support the prosecution case at all. PW 3 is Gundopant Deshpande, the Superintendent of Central Excise who had filed complaint which is at Exhibit 1. PW 4 Vijay Mali and PW 5 Sanjay Barge had acted as panchas to the search and seizure, both of whom had turned hostile and did not support the prosecution case. Lastly the prosecution examined Hanmant Kadam as PW 6 who produced the gram panchayat extract to show that the premises in question stood in the name of the respondent-accused. The defence of the accused was of denial.

4. After considering the entire evidence on record the learned Sessions Judge by his impugned judgment and order dated 2/5/1995 acquitted the respondent-accused holding that the prosecution has not proved the conscious possession of the respondent accused beyond reasonable doubt. The said order of acquittal is under challenge in this appeal filed by the complainant.

5. With the assistance of Mr.Salvi appearing for the appellant-complainant we had gone through the evidence on record and perused the documents produced by the prosecution. We also went through the reasoning of the trial Court. After considering the evidence on record we concur with the finding of the trial Court that the prosecution has not proved beyond reasonable doubt the conscious possession of the respondent-accused. In addition we find that there was non-compliance of Section 42 of the NDPS Act which has been held to be mandatory, though the trial Court, by following the earlier decision of this Court, was of the view that the said provision not being mandatory non-compliance therewith would not vitiate the trial in the absence of proof of

prejudice.

6. The search and seizure of the premises had been taken according to the prosecution case pursuant to the information received by the officers of the Central Excise. PW 1 Inspector Rasal who was member of the raiding party has deposed that on 7/10/1991 when he reached the office the other two Inspectors by name Shedge and Kadam who were standing in front of their office told him about the information received by them and that they had to proceed for raid as soon as the Superintendent Deshpande arrived. Mr.Deshpande arrived in the office at about 10 a.m. Inspector Shedge and Inspector Kadam told him about the information whereupon the Superintendent issued authorisation to carry out the search. Superintendent Deshpande himself accompanied the raiding party. The said officer does not in his examination-in-chief make a mention about the information having been reduced to writing anywhere. In his cross-examination he stated that he could not say if his office maintained any register for recording the information of crime. According to this witness Inspectors Shedge and Kadam had received the information and Shedge had verified the

information. He was orally told that he had to accompany them for raid after Superintendent Deshpande arrived in the office. The other witness examined by the prosecution is Superintendent Deshpande himself as PW 3. In his evidence he stated that Shedge gave him the information which he had collected and verified pursuant to which he issued authorisation letter for search in favour of Inspector Rasal. Nowhere in his evidence he stated that any copy of the gist of information reduced to writing was produced or shown to him. In the cross-examination he admitted that he did not obtain any written information from Shri Shedge. PW 1 Rasal has stated that he was not aware whether any register was maintained in that behalf.

7. In the case of State of Punjab v. Balbir Singh reported in **AIR 1994 SC 1872** the Supreme Court has held that provisions of Section 42 are mandatory and if the information received by the officer is not reduced to writing there will be non-compliance of Section 42(1) of the Act which would vitiate the trial. As regards Section 42(2) whereunder the officer receiving the information is supposed to forward the copy of the information to his superior

officer, it has been held that if there is total non-compliance then also it would vitiate the trial and to that extent it is mandatory. It is significant to point out that even the complaint dated 1/4/1992 filed by the Superintendent Deshpande PW 3 does not make mention about reducing the gist of information to writing or copy thereof having been given to him by officer Shedge who had received the information. Thus total non-compliance of the mandatory provision of Section 42 vitiates the trial and, therefore, also the accused is entitled for acquittal.

8. In the evidence of the prosecution witnesses there is nothing on record to indicate that after seizure of contraband and the arrest of the accused report as required under Section 57 of the Act was submitted to the superior officer and, therefore, there is non-compliance of the said provision which is held to be mandatory. In the case of Mohinder Kumar v. State, Panaji, Goa reported in **(1998) 8 SCC 655** a three-Judge Bench of the Supreme Court has observed that in Balbir Singh's case (Supra) it had been further stated that the provisions of Sections 52 and 57 which deal with the steps to be taken by

the officer after making arrest or seizure are mandatory in character. Since no material had been shown on the record for adhering to the mandatory requirement it was held that the accused was entitled for acquittal. Aforesaid decisions were followed by the apex Court in the case of Thandi Ram v. State of Haryana reported in **1999 (3) LJ (SC) 679** and the conviction was held bad in law for non-compliance of Sections 55 and 57 of the Act and the accused was acquitted setting aside the orders of the two Courts below.

9. In a later decision in the case of Gurbax Singh v. State of Haryana reported in **2001 AIR SCW 670**, though it was observed by the Supreme Court that the provisions of Sections 52 and 57 are directory and, therefore, violation of those provisions would not ipso facto violate the trial or conviction, yet since the I.O. had not followed inter alia the procedure prescribed under Section 57 of the NDPS Act of making full report of all the particulars of arrest and seizure to his immediate superior, it was held that due to faulty investigation it would not be safe to convict the accused for a serious offence of possessing poppy-husk.

10. The trial Court was also not satisfied about the prosecution having proved the conscious possession of the respondent. None of the panchas had supported the search and seizure. Curiously enough the prosecution has not even proved the seizure panchanama without which the search as well as possession of the accused cannot be proved. The gram panchayat extracts have been produced to show that the premises in question stood in the name of the respondent who was a middle aged lady having grown up married sons. The prosecution tried to show that the son of the accused was residing separately but the correspondence in the premises was found in the name of the son of the respondent-accused giving address of the premises in question and, therefore, the trial Court has observed that if at all, the son of the accused might be dealing in contraband and it could not be said that the respondent-accused was dealing in contraband. It is significant to note that according to the prosecution case the respondent-accused had not shown the contraband but the officers themselves had found it out while searching the house. Two polythene packets containing contraband were noticed by the officers

after removing the frames. The other contraband was found in the tins. Neither the place behind the frames nor the tins are alleged to have been pointed out to the officers by the respondent-accused and, therefore, in our view, the trial Court cannot be said to be wrong in holding that the conscious possession of the respondent is not proved. The view taken by the trial Court is a possible view which cannot be substituted in an appeal against acquittal.

11. According to the officers, at the time of seizure the respondent-accused was not the only person present in the house but there were other three ladies and one male member present in the house and it is not the case of the officers that respondent-accused had shown where the contraband was kept which was found by the officers themselves while taking search of the house. In this context it is relevant to point out that the information received by the officer was not against the respondent-accused as such but only about the keeping of the ganja in the premises which, on verification, was found by the officers to be in the name of the respondent-accused. Neither it is the case of the officers of the Central Excise that the information was in the name of the

respondent-accused nor the gist of information supposed to have been reduced to writing, which under the law is required to be reduced to writing, has been produced to show the exact nature of information received by the officers. The name of the respondent-accused must have been mentioned in the search warrant due to the fact that before search warrant was issued Inspector Shedge on verificiation found that the premises stood in the name of the respondent-accused. That is why her name must have been mentioned in the search warrant. It appears that the respondent was made accused only because the premises in question stood in her name. In search warrant Exhibit 20 what is mentioned is that the contraband was concealed in the premises of Rashidabi Gulab Hussain Shaikh Kalakai, Koregaon. It was not stated therein that contraband was concealed by her in the said premises.

12. This explains the importance of reducing the information to writing as mandated by Section 42 of the Act. If the gist of information had been reduced to writing in this case and produced before the Court it would have helped the Court to ascertain whether the information was that contraband was kept by the

Respondent in the house or whether the information was simply that it was kept in the house without mentioning who had kept the contraband there. It is for this reason that in para 19 of the judgment in the case of Abdul Rashid Ibrahim Mansuri v. State of Gujarat reported in **AIR 2000 SC 821** the apex Court has observed as follows:

> "...non-recording of information has in fact deprived the appellant as well as the Court of the material to ascertain what was the precise information which PW 2 (officer) got before proceeding to stop the vehicle. Value of such an information, which was the earliest in point of time for ascertaining the extent of the involvement of the appellant in the offence was of a high degree. A criminal Court cannot normally afford to be ignorant of such a valuable information. It is not enough that PW-2 was able to recollect from memory, when he was examined in Court after the lapse of a long time, as to what information he got before he proceeded to the scene." (Underlining supplied)

13. Consequently, in view of the aforesaid discussion, we find no substance in this appeal. Hence we confirm the order of acquittal on the ground that prosecution had not proved the conscious possession of the Respondent and on the additional grounds of non-compliance of the mandatory provisions like Sections 42 and 57 of the Act. The prosecution has failed even to prove the possession of contraband in the house since panchanama of search and seizure is also not proved which was marked "X" for identification and proof but remained to be proved.

14. In the result, we confirm the order of acquittal recorded by the Sessions Judge, Satara in Sessions Case No.70 of 1992 and consequently dismiss the appeal. The bail bond of respondent no.1-accused shall stand cancelled.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)